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No. 84-657

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BANKERS TRUST COMPANY,

Petitioner,

—v.—

DANIEL RHOADES, HERMAN SOIFER, MILTON BRATEN, BROOKFIELD CLOTHES, INC., BROOKFIELD INDUSTRIES, INC., BENNINGTON COURT LTD., BRAXTON LTD., AURA BY LAURIE LTD., ERWIN COMMERCIAL CORP., MICHAEL B. MARKS, INC., TIMELY TEXTILES, INC., TODD EQUIPMENT LEASING CO., INC., CAPITAL AID CORPORATION and "JOHN DOES NOS. 1-50",

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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30 pp

COUNTERSTATEMENT OF THE QUESTION PRESENTED FOR REVIEW

Bankers Trust Company's ("Bankers") petition for certiorari herein, in stating the question presented for review, commits at least three inaccuracies.

First: The petition misstates the ground on which the Court of Appeals based its decision. The Court did not say that a civil RICO action will not lie "if plaintiff's injuries were caused by the criminal acts through which the enterprise was conducted", (as asserted in the petition, page i).

Rather, the Court of Appeals' opinion clearly states that the complaint must allege an "injury caused by a RICO violation, not just one caused by some of the essential elements of a RICO violation", (Appx. to Petition, p. 14a).

Second: The petition fails to refer to a question which was raised below but not answered, that is: Does Bankers have standing to sue? The Court of Appeals decision affirming dismissal of the complaint made it unnecessary to decide this question. Plaintiff's standing to sue is a threshold question. Once the Court recognizes that plaintiff has no standing to sue, then the judgment below must stand, regardless of the interpretation of RICO sections 1961, 1962, and 1964.

Third: By the curious omission of any reference to the pleadings, Bankers' petition presents a completely unfocussed and erroneous picture of the issues presented. Nowhere does the petition mention that it seeks a review of a Court of Appeals affirmance of a District Court judgment on the pleadings, which dismissed the complaint on motion because it did not state an enforceable claim.

Neither the petition nor the 139 page appendix to it quotes from, or contains a copy of the complaint. That approach facilitates Bankers' unrestrained misdescription of its alleged injured innocence, and of respondents' alleged infamy. Moreover, it obfuscates the precise question presented. We therefore append a copy of the complaint hereto.

The precise questions presented for review are:

First: Does the complaint state a cause of action for a civil remedy under U.S. Code Title 18, Section 1964 although

(a) it fails to allege that any violation of Section 1962 caused any injury to the plaintiff,

(b) but instead, alleges that certain acts of the nature described in Section 1961 caused the alleged injury?

Second: Does the plaintiff have standing to assert this alleged injury?

If the answer to the latter question is "no", the other question need not be decided.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully submit that this Court should deny the petition for writ of certiorari which seeks review of the judgment herein of the United States Court of Appeals for the Second Circuit, entered July 26, 1984.

STATEMENT OF THE CASE

The statement of the case on behalf of Bankers Trust Company ("Bankers") contains half-truths and omissions, and draws conclusions from premises entirely unsupported by the record. The effect of this would be entirely misleading, if uncorrected.

Bankers brought this civil action under U.S.C. Title 18, Section 1964, ("RICO") seeking treble damages from the various defendants herein. Bankers alleged that defendants violated Section 1962, and caused damage to Bankers, by committing wrongs described in Section 1961.

Bankers' petition neglects to mention the procedural history of this case, and argues as if the allegations in the complaint, both factual and argumentative, had been proved below. On the contrary, the defendants filed answers denying the complaint's allegations. Thereafter, defendants moved to dismiss the complaint for failure to state an enforceable claim. The District Court judgment dismissed the complaint, and the Second Circuit Court of Appeals affirmed.

1. The Alleged Bankruptcy Fraud

A reading of the complaint makes it clear that Bankers has no standing to bring this action. This is so for two independent reasons.

First: the principal allegations of wrongful acts are allegations of wrongs done, not to Bankers, but to the creditors of Braten Apparel Corporation ("BAC") a debtor in insolvency proceedings under Chapter XI of the Bankruptcy Act, U.S. Code Title II.

Paragraphs 13 to 28 and 35 to 43 of the lengthy complaint set forth the alleged wrongful acts of defendants as: concealment of assets of a debtor corporation in proceedings under Chapter XI of the Bankruptcy Act, and related acts, that is, incomplete schedules, and misleading testimony at hearings in the Chapter XI proceedings, resulting in a scaling down of corporate debts. However, the scaling down was revoked, so no damage was done by this alleged misconduct.

Furthermore, the complaint (in paragraphs 13, 14, 16, 17, 20, 21, and 41) clearly states that these alleged wrongful acts were directed not against Bankers, but were aimed at defrauding the debtor corporation and all its creditors and other interested parties, whose rights are still subject to determination in the pending proceedings in the Bankruptcy Court.

For example, the complaint alleged that assets were concealed "so that BAC's indebtedness to its creditors would be eliminated" (complaint, par. 13), and "to secrete the asset...from the claims of BAC's creditors" (id., par 14).

As pointed out below, this cause of action asserted by Bankers is one which cannot be asserted by a single creditor. Only a representative of all the creditors of the debtor can assert such a claim. To allow each creditor his own separate RICO action would nullify the bankruptcy law by permitting races for preference (with triple crowns for the victors) that the bankruptcy laws were enacted to prevent.

Second: In the Chapter XI Bankruptcy proceedings Bankers alleged that it was a secured creditor. BAC, the debtor, urged that Bankers was fully secured, that is, that if Bankers properly liquidated its security it would have been fully paid from it, and so it could not participate in the general fund available for unsecured creditors.

The Bankruptcy court has held hearings on this question, but has not yet decided it.

If and when the Bankruptcy court holds that Bankers has been fully paid, then Bankers, not having suffered any damage, will of course have no right to complain of alleged wrongful conduct of the debtor.

2. The Alleged Bribery

Bankers' petition neglects to inform the Court that it brought an action in the United States District Court against Rhoades for civil damages for this same alleged bribery, *Bankers Trust Co. v. Rhoades*, Southern District of New York, 1981 Civ. 6849 (ADS).

Bankers conducted extensive discovery proceedings in that action. It examined a dozen witnesses. It learned among other

things that the Supreme Court of South Carolina had conducted an investigation of the matter and determined that the accusation was without merit.

When Rhoades moved for summary judgment dismissing the complaint, Bankers voluntarily discontinued the action. District Judge Soafer retained jurisdiction to award Rhoades costs and attorney's fees against Bankers.

3. The Alleged RICO Injury to Bankers

The complaint, in paragraphs 50, 51, 52, and 53 states in conclusory language, paraphrasing the statute, that "defendants" have violated Title 18, section 1962 (a), (b), (c), and (d).

However, when the complaint addresses the question of what caused damage or injury to Bankers, it specifically states, (paragraph 54), not that these alleged violations of section 1962 caused Bankers' damages, but that "the fraud of defendants has prevented Bankers from receiving payment of (its) debt". It is obvious from a reading of section 1962 that preventing collection of a debt does not violate that section.

On appeal, the Court of Appeals for the Second Circuit affirmed dismissal of the complaint, with one dissent. In a lengthy opinion the court discussed the statute involved, and stated that the complaint failed to satisfy the statutory requirement that the plaintiff be injured "by reason of a violation of section 1962". See, Appendix to petition, Majority opinion, pp. 3a to 18a; Dissent, pp. 18a to 32a.

REASONS FOR DENYING THE WRIT

I.

THE PLAINTIFF HAS NO STANDING TO SUE

The question of plaintiff's standing to sue should be answered before reaching the question of interpretation of RICO (18 U.S.C. Secs. 1961 to 1964), because a reading of the complaint reveals that petitioner, Bankers, has no standing to bring this action.

The principal wrongs alleged were: concealment of BAC's valuable asset (stock of defendant Brookfield Clothes), by failure to list that stock in the schedules of BAC's assets, thus scaling down debts by obtaining confirmation of a plan of arrangement in Chapter XI through false or misleading testimony that this stock was not owned by BAC.

These alleged wrongs were not done to Bankers, nor did they take anything from Bankers. Rather, an asset was temporarily concealed from all the creditors of BAC, the Chapter XI debtor corporation, to induce them all to agree to a plan of arrangement.

The complaint clearly and repeatedly shows that the injuries alleged were potential injuries to all of the debtor corporation's creditors. This is shown again and again, in paragraphs 13, 14, 16, 17, 20, 21, and 41 of the complaint. There is no showing of any particular injury to Bankers.

These allegations might support a cause of action by BAC's creditors, generally, through their representative in the Chapter XI proceedings. They do not support an action by a single creditor.

Moreover, even these threatened injuries were remedied by the later revocation of the plan of arrangement.

In its brief herein to the Second Circuit Court of Appeals, Bankers admitted that the revocation of the plan of arrangement eliminated any damage to it other than its legal expenses. It is well settled that expenditure for legal fees and other expenses will not be recognized as damages recoverable in a subsequent action between the same parties, 22 American Jurisprudence 2d. 234 ("Damages", Sec. 165). To the same effect, see *Demsey and Associates v. S.S. Sea Star*, 500 Fed.2d 409 (C.A.N.Y. 1974).

The only recognizable damage alleged by Bankers is hindrance and delay in the collection of that part of the debt, if any, still owing to it from BAC and not fully paid from sale of the collateral. As yet, the Bankruptcy judge has not determined whether or not Bankers has been fully paid.

Bankers, having asserted its creditor's claim in the Chapter XI insolvency proceedings, is now attempting by the present action to obtain an unlawful preference over the other creditors, using a different judicial forum.

This court has refused to permit such an attempt to gain an unlawful preference over other creditors in evasion of the bankruptcy law, by using a different remedy in a different forum.

In *Pepper v. Litton*, 308 U.S. 295 (1939), certain assets of an insolvent debtor had been recovered from the debtor corporation by its officers pursuant to a state court judgment in their favor. This Court affirmed the bankruptcy court's order directing return of the assets to the debtor, despite the state court judgment which had ordered them to be paid to the officers. It stated that the bankruptcy court's jurisdiction to provide a remedy for wrongful transfer or concealment of assets "is exclusive of all other courts", 308 U.S. at 304.

The Supreme Court's opinion in *Pepper* states that the remedy for wrongful transfer or concealment of assets of a debtor in insolvency proceedings,

> "while normally enforceable directly by the corporation, ... is, in the event of bankruptcy of the corporation, enforceable by the trustee....for the protection of the entire community of interests in the corporation - creditors as well as stockholders...." (308 U.S. at 307).

Bankers is using this action in a blatant attempt to obtain an unlawful preference to the detriment of the other creditors of BAC. If each creditor of a debtor in Chapter XI (or of a bankrupt) could bring a civil RICO action for such a cause, the race to collect (triply) would be on, and the basic function of the Bankruptcy Act would be frustrated.

II.

THE COMPLAINT FAILS TO ALLEGE THAT PLAINTIFF WAS DAMAGED BY A VIOLATION OF SECTION 1962

As mentioned above, Bankers' complaint paragraph 50 distinctly alleges, albeit in conclusory, not factual fashion, a violation by defendants of 18 U.S.C. Sec. 1962 (a). It alleges violation of Sec. 1962 (b) in paragraph 51, violation of Sec. 1962 (c) in paragraph 52, and violation of Sec. 1962 (d) in paragraph 53.

This detailed pleading shows familiarity with the statute. However, Bankers' complaint does not allege that Bankers was injured by the conduct of an enterprise, or by any other violation of section 1962. It expressly alleges instead, in par. 54, that Bankers' alleged damage was caused, not by any of the section 1962 violations, but by acts specified in section 1961:

> "...the fraud of defendants has prevented Bankers from receiving payment of such debt...In addition, defendants' fraud has caused Bankers to spend over $100,000 in legal fees" etc.

The plain language of the RICO statute supports the decision of the Court of Appeals, that this fails to meet the requirements of standing to pursue a civil remedy under Section 1964. That section permits only that:

> "(c) Any person injured...by reason of a violation of section 1962 of this chapter may sue therefor...and shall recover threefold the damages he sustains" etc.

Bankers' attorneys clearly state in their complaint that the alleged injury to Bankers was not by reason of violation of section 1962. Rather, the complaint says that plaintiff was injured by reason of acts specified in section 1961, that is, acts constituting an insolvency fraud.

It is not surprising that their petition avoids reference to their complaint.

III.

THE QUESTION OF RICO INTERPRETATION IS MOOT

If the question of interpreting the RICO statute as applied to civil remedies, involving the interrelation of Section 1964 of Title 18 with Sections 1961 and 1962, is indeed a question of national interest, then it should be resolved in connection with a dispute which necessarily turns on this point.

This Court has repeatedly held that certiorari should not be granted when the plaintiff has no standing to sue, or the issue sought to be resolved is moot for any reason.

New Orleans v. Emsheimer, 181 U.S. 153 (1901)
United States v. Alaska S.S. Co., 253 U.S. 113 (1920)

In the latter case this Court declined to accept the case although the United States was a party, and although the Court noted that it would be convenient for the government to have the question decided.

To the same effect, see:

Local No. 8-6 v. Missouri, 361 U.S. 363 (1960)
Peters Patent Corp. v. Bates, 295 U.S. 392 (1935)

Since Bankers has no standing to bring this action, any pronouncement herein by this Court will be either dicta, or a mere alternative basis for decision.

Apparently, however, this need not leave unsettled for long the question of the interrelation of RICO sections 1961, 1962, and 1964, since there are presently pending before this Court petitions for certiorari in two other cases which appear to turn upon this legal issue, namely, *Sedima, S.P.R.L. v. Imrex Co., Inc.*, (2d. Cir. July 25, 1984), and *Furman v. Cirrito* (2d Cir. July 27, 1984). If this court wishes to pass upon the interpretation and interrelation of RICO sections 1961, 1962, and 1964, it will be able to do so in those cases by way of a determination, rather than by a mere dictum, which is all the present case permits.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated November 16, 1984.

SUPPLEMENTAL APPENDIX

United States District Court
Southern District of New York

82 Civ. 5590

BANKERS TRUST COMPANY,

Plaintiff,

– against –

WALTER FELDESMAN, DANIEL RHOADES, HERMAN SOIFER, MILTON BRATEN, BROOKFIELD CLOTHES, INC., BROOKFIELD INDUSTRIES, INC., BENNINGTON COURT LTD., BRAXTON LTD., AURA BY LAURIE, LTD., ERWIN COMMERCIAL CORP., MICHAEL B. MARKS, INC., TIMELY TEXTILES, INC., TODD EQUIPMENT LEASING CO., INC., CAPITAL AID CORPORATION and "JOHN DOES NOS. 1-50",

COMP

Defendants.

Plaintiff, by its attorneys Moses & Singer, alleges as follows:

Jurisdiction and Venue

1. This action is brought to recover damages by reason of defendants' violations of the Racketeer Influenced and Corrupt Organization Act, Title 18 U.S.C. §1961 *et seq.*, and under principles of pendent jursidiction. Jurisdiction is proper pursuant to 18 U.S.C. §1964(a). Venue is proper pursuant to 18 U.S.C. §1965(a) since all defendants either reside, are found, have agents, or transact business in this district.

Parties

2. Plaintiff Bankers Trust Company ("Bankers") is a corporation incorporated under the laws of the State of New York, with its principal place of business in New York. Bankers is engaged in the banking business.

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3. Defendant Milton Braten ("Braten") is a resident of New York State. Braten is a principal shareholder in and an officer of Braten Apparel Corporation, a New York corporation ("BAC"), and an officer, director and/or shareholder (directly or through other corporations or trusts) of all of the corporate defendants.

4. Defendant Daniel Rhoades ("Rhoades") is an attorney admitted to practice before the Courts of the State of New York and the United States District Court for the Southern District of New York. Rhoades is counsel to Braten, BAC, and the other corporate defendants and is an officer, director and/or shareholder of BAC and (directly or through other corporations or trusts) of all of the corporate defendants.

5. Defendant Walter Feldesman ("Feldesman") is an attorney admitted to practice before the Courts of the State of New York and the United States District Court for the Southern District of New York. At various times alleged herein Feldesman has represented, or purported to represent or continues to represent, BAC, defendant Brookfield Clothes, Inc., ("Brookfield") and /or defendant Herman Soifer.

6. Defendant Herman Soifer ("Soifer") is a resident of New York State. Soifer is a shareholder in BAC and an officer, director and/or shareholder (direct or indirect) of all of the corporate defendants.

7. All of the named corporate defendants (sometimes referred to as the "corporate defendants") are incorporated under the laws of, and have their principal places of business in, the State of New York.

8. The "John Doe" defendants are persons whose identities are now unknown to Bankers and are such other individuals, firms and corporations which own, comprise, participate in or control the enterprise hereinafter described, or which are owned or controlled by the individual defendants.

9. Feldesman, Rhoades, Braten and Soifer participate in, own, and/or control BAC and the corporate defendants; and

they, and the corporate defendants, constitute an enterprise engaged in, and whose activities affected, interstate commerce. So far as now known to Bankers, the business of the corporate defendants includes the import, manufacture and sale of goods, in New York, South Carolina and elsewhere, resulting in a business receiving over $50,000,000 per year.

10. At all relevant times Bankers was and still is a creditor of BAC. The debt, inclusive of interest, owed by BAC to Bankers, as at the date of this complaint, exceeds the amount of $4,000,000.

11. In August of 1974, BAC acquired, and it owned, all of the stock of Brookfield. Brookfield then had net assets, in excess of liabilities, of more than $3,000,000.

12. In August 1974, BAC owed substantial debts to Bankers and to others, and had recently sustained severe losses.

13. In August 1974, Feldesman, Braten and Soifer intended and agreed that BAC's recently acquired ownership of Brookfield be concealed and that BAC seek to obtain an arrangement with its creditors pursuant to Chapter XI proceedings to be brought in Bankruptcy Court, so that BAC's indebtedness to its creditors would be eliminated and, subsequent thereto, Braten and Soifer would be the owners of an enterprise including BAC and Brookfield.

14. In late August 1974, in order to secrete the asset which BAC had recently acquired, i.e., the stock of Brookfield, from the jurisdiction of the Bankruptcy Court and from the claims of BAC's creditors, Feldesman drafted, and Braten and Soifer executed, a document hereinafter described as the "Shareholders' Agreement".

15. Pursuant to one clause contained in the Shareholders' Agreement, BAC or Braten was required to furnish to Brookfield a $250,000 loan by a specified date, in default of which BAC's stock in Brookfield, held by Feldesman, would appear to be owned by Soifer.

16. Feldesman drafted the Shareholders' Agreement, and Soifer and Braten executed the same, at a time when they knew and intended that the apparent condition therein had not and would not be met, with the intent that BAC's creditors, upon being shown the Shareholders' Agreement and being told that the condition had not been met, would be led to believe that BAC no longer had any interest in Brookfield.

17. The Shareholders' Agreement was a sham and was not intended by Feldesman, Braten or Soifer to have any legal validity as between or among BAC, Braten and Soifer. Instead, an understanding and agreement existed among Braten, Soifer and Feldesman that Brookfield would be held in secret trust by Soifer during the pendency of BAC's Chapter XI proceedings, and would be returned to BAC after BAC had achieved the elimination or scaling down of its debt through a confirmed plan of arrangement in the Chapter XI proceedings. Although Feldesman had represented BAC and its principals since prior to August, 1974, Feldesman represented to creditors that he was counsel to Soifer and not BAC. Moreover, and on behalf of Soifer, Feldesman misrepresented to Bankers and to BAC's other creditors the validity of the Shareholder Agreement, in the manner herein alleged.

18. To further their scheme, among other things, Feldesman caused the stock of Brookfield to be transferred to Soifer; and Feldesman counseled BAC to file a petition in Chapter XI before the United States District Court for the Southern District of New York omitting BAC's ownership of the stock of Brookfield and omitting also the transfer of said stock to Soifer, which Braten caused BAC to do on September 5, 1974. Feldesman acting on behalf of BAC, caused to be retained Leinwand, Maron, Hendler & Krause ("Leinwand") as attorneys for BAC in the said Chapter XI proceedings. Thereafter, Feldesman recommended that Rhoades be retained as counsel to Braten and, ultimately, as counsel to BAC in said Chapter XI proceeding. Rhoades was retained in both capacities. In October 1974, without the disclosure thereof to the Bankruptcy Court or to Bankers, Feldesman received a "forwarding fee", from or on behalf of BAC or Leinwand, in respect of services rendered by

Feldesman for BAC, in conjunction with Leinwand, in connection with said Chapter XI proceeding. Feldesman continued as counsel to Brookfield, receiving at least $18,000 annually on retainer, which payments continue to date.

19. Feldesman, Soifer, Rhoades and Braten omitted to reveal to Bankers the secret trust, referred to herein, and they affirmatively misrepresented to Bankers and to the Bankruptcy Court that the apparent condition in the Shareholders' Agreement had not been met, and that therefore BAC had no ownership interest in Brookfield. Bankers believed and relied upon such omissions and misrepresentations to its detriment, inter alia, by accepting a plan of arrangement proposed by BAC whereunder it would accept 17 1/2% of its allowed claim therein.

20. Such misrepresentations. omissions and false statements, among others, were made under the following circumstances, all in the City of New York: (A) Feldesman, as purported attorney for Soifer and Brookfield, represented to Bankers that Soifer was the owner of Brookfield on, among other dates, September 4, 1974, and in the period from May through July 1975; (B) Soifer made the same representation in a statement intended by him to be disseminated to BAC's creditors, including Bankers, which was published on August 27, 1974; (C) Braten represented to Bankers that BAC had no interest in (or had lost its interest in) Brookfield on, among other dates: August 27, 1974, in a meeting attended by Braten; September 5, 1974, in BAC's Chapter XI written petition and supporting schedules, all of which were sworn to by Braten; December 5, 1974, in Braten's sworn testimony in Bankruptcy Court; December 12, 1974, in financial statements of BAC prepared in relevant part by Braten and distributed to BAC's creditors, including Bankers, at a meeting held that day; and (D) Braten and Rhoades made the same or substantially the same representations on, among other dates: August 22, 1975, in a pleading prepared by Rhoades in behalf of BAC and verified by Braten; September 30, 1975, in an amended pleading prepared by Rhoades on behalf of BAC and verified by Rhoades; January 27, 1976, in Braten's sworn testimony given in Bankruptcy Court, the substance of which

was prepared in part by Rhoades; March 8, 1976, in an amendment to BAC's schedules sworn to by Braten, and submitted by Rhoades to the Bankruptcy Court; and March 9, 1976, in Rhoades' testimony in Bankruptcy Court.

21. By reason of the individual defendants' misrepresentations and omissions BAC's creditors, including Bankers, were induced to believe that BAC did not own the stock of Brookfield and they were induced to accept a plan of arrangement based on assets of BAC which did not include said stock. Bankers' acceptance of said plan was necessary to the obtaining of assent of the majority, in dollars owed, of creditors, and, as such, necessary to its confirmation.

22. On March 12, 1976 the Bankruptcy Court made an order confirming BAC's plan of arrangement. As a net effect of such confirmation, BAC was relieved of debts of more than $4,300,000.

23. On or about March 12, 1976 (a) Brookfield had or anticipated sales of approximately $18 million per year and net income in excess of $1.4 million per year, (b) Brookfield had a value in excess of $10 million, and (c) the stock of Brookfield was an asset of BAC having value sufficient to have paid in full the debt owed to Bankers.

24. Had Bankers known that the stock of Brookfield was an asset of BAC, the plan of arrangement proposed by BAC would not have been accepted by Bankers. Had Bankers discovered, between September 1975, the time when Bankers filed its acceptance of the plan, and March 1976, that the stock of Brookfield was an asset of BAC, it would have revoked its acceptance of the proposed plan prior to the confirmation order. A plan of arrangement made with the stock of Brookfield as a revealed asset of BAC, or a liquidation of BAC whose assets included the stock of Brookfield, would have resulted in an amount sufficient to have paid in full the debt owed to Bankers.

25. Commencing in August 1976, the individual defendants participated in the beginning of Soifer's consummation of his part of his secret trust with Braten. Among other things, in or about August 1976, Soifer acquired from Braten 50% of the stock of defendant Brookfield Industries, Inc., to which entity a substantial

portion of the assets of Brookfield were conveyed; and on August 20, 1976, Feldesman delivered the stock of Brookfield to Soifer who, in turn, delivered such stock to Rhoades on behalf of Braten and BAC.

26. In late August 1976, Rhoades, Soifer and Braten revealed to Brookfield's then-auditors that, since August 1974, BAC had been and continued to be the owner of the Brookfield stock.

27. In October 1976, the individual defendants continued to create the corporate enterprise of which they were to become, and did become, the owners or participants. In October 1976, Soifer purchased from Braten 45% of the stock of BAC. In July 1977, Soifer delivered to Braten his $450,000 note, in part payment for said BAC stock, which note was then assigned by Braten to Rhoades.

28. In September 1976, Bankers commenced a proceeding in this Court to revoke BAC's confirmation of its arrangement as having been procured by fraud. In the course of such proceeding Bankers ascertained the secret trust referred to above and the falsity of the representations referred to herein.

29. In order to further hinder and delay Bankers' collection of the debt owed to it Rhoades and Braten instituted a series of lawsuits against Bankers in New York State in the name of BAC and Braten, and participated in and caused the institution of lawsuits in New York State, against Bankers, in the name of other corporations owned or controlled by Braten. In those actions the complaints alleged, in substance, that Bankers breached some commitment to continue extending credit to BAC, and the complaints sought damages in the millions of dollars. All of said claims were summarily dismissed after Bankers had incurred and paid substantial legal expenses in connection therewith.

30. In August 1977, BAC, by a South Carolina law firm to which Rhoades was counsel, instituted an action against Bankers in the State of South Carolina (the "South Carolina Damages Action") seeking $195,000,000 in damages by reason of allegations similar to those made in the aforedescribed New

York actions. In addition, in or about August 1977 another South Carolina action was pending (the "Escrow Action"), in which Braten, by the same South Carolina law firm, asserted claims, superior to those of Bankers, to funds in escrow arising out of the sale of machinery in which Bankers had a security interest.

31. At the relevant times, William H. Ballenger was the Judge presiding in both the South Carolina Damages Action and the Escrow Action.

32. In late 1978 and early 1979, among other things, Rhoades, through a South Carolina corporation formed by him, agreed to and did acquire or assume a mortgage debt in respect of real property, on which debt Judge Ballenger was personally obligated to the extent of $100,000, and Rhoades has paid such debt to the obligee as installments thereof have become due.

33. By reason of the aforementioned transactions, by which Rhoades conferred a benefit on Judge Ballenger, Judge Ballenger was induced to render decisions favorable to BAC and to Braten. Among other things, by order dated January 18, 1979 Ballenger appointed, as Special Referee in the Escrow Action, having powers which could deprive Bankers of the right to a jury trial, an attorney who was the former law partner of the lawyer to whose firm Rhoades was counsel; and, by order dated November 9, 1978, Judge Ballenger denied Bankers' motion to dismiss the South Carolina Damages Action.

34. The acts of Judge Ballenger, induced by the benefits conferred by Rhoades, caused Bankers to expend over $100,000 in legal fees, which Bankers incurred until (a) Judge Ballenger recused himself from the Escrow Action because of a "possible conflict of interest," and (b) Judge Ballenger's decision refusing to dismiss the South Carolina Damages Action was reversed by the Supreme Court of that State, as an abuse of discretion.

35. The trial of the revocation proceeding brought by Bankers, referred to in paragraph "28", concluded on February 1, 1982. The individual defendants, all of whom testified in the trial, knew that the Bankruptcy Court would proceed to decide the cause and render its opinion.

36. In January 1982, defendant Bennington Court Ltd. obtained advances of over $8.9 million from KB Business Credit Inc. ("KBBC"), a financing company. These advances were obtained by means of wire transfers of funds, requested of KBBC, and made to the corporate defendants' bank accounts located in New York City, Greenville, South Carolina, and San Francisco, California. These funds were disbursed, transferred among, or secreted or abstracted by the members of the enterprise.

37. Some of the above-named corporate defendants issued to KBBC checks drawn on insufficient or uncollected funds, or on stopped bank accounts, and otherwise failed to repay to KBBC the over $8.9 million obtained by the enterprise.

38. KBBC then commenced a lawsuit in this Court against many of the defendants herein, and others affiliated with the defendants herein, captioned "KB Business Credit, Inc., Plaintiff, against Milton Braten, et al." In said lawsuit KBBC charged said defendants, *inter alia*, with wire fraud and other acts constituting violations of Title 18 U.S.C. §1961 *et seq.*, and KBBC sought to recover treble the amount of its damages from the defendants.

39. In April 1982, at a time when BAC was a party to the revocation proceeding and a decision by the Bankruptcy Court was awaited, and at a time when BAC, Braten, Rhoades and other members of their enterprise were defendants in the KBBC lawsuit, BAC conveyed its stock in Brookfield to defendant Todd Equipment Leasing Co., Inc. ("Todd") for no consideration or an inadequate consideration. As of June 29, 1982, defendants had not yet decided who would be shown to be the owner of Todd. On August 5, 1982, Rhoades, Braten and their counsel represented that Todd is owned by defendant Capital Aid Corporation, which in turn is owned by Rhoades as a "nominee" or trustee for the benefit of Braten and Soifer, although, even on August 5, 1982, said counsel represented that no documents had been prepared or executed to reflect such represented beneficial ownership.

40. In April 1982, in order to induce KBBC to discontinue its lawsuits and thereby relieve the named individual defendants of personal liability, BAC caused Todd, which was not sued as a defendant in the KBBC lawsuit, to pledge to KBBC the Brookfield stock. Such pledge was made to secure more than $8.9 million obtained from KBBC by the other defendants forming part of the enterprise.

41. During the pendency of the revocation proceeding, and while BAC was a party to said judicial proceeding, BAC secreted and conveyed its assets, and those of its affiliates and subsidiaries, including making conveyances to the remaining defendants herein without any consideration to BAC or the transferors, to further hinder and prevent the satisfaction of the claims of Bankers and of other creditors. Such conveyances, including the transfer of the stock of Brookfield, were made at a time when BAC was insolvent, or which rendered BAC involvent.

42. On June 25, 1982, as amended on June 30, 1982, the Bankruptcy Court rendered its Opinion in the revocation proceeding. The Bankruptcy Court found, among other things, that the individual defendants had devised, participated in and furthered a scheme to defraud; that the fraudulent conduct included the making of false oaths in BAC's schedules as to the assets of the estate; that the individual defendants had intentionally concealed property of BAC; and that the confirmation of BAC's plan of arrangement had been procured by the individual defendants' fraud.

43. On June 30, 1982, the Bankruptcy Court made and entered an order which, among other things, revoked the confirmation of BAC's plan of arrangement and reinstated the Chapter XI proceeding.

44. The preparation and execution of the sham Shareholders' Agreement and the apparent transfer of the stock of Brookfield to Soifer, in contemplation of BAC's commencement of a case under U.S.C. Title 11, constituted the knowing and fraudulent transfer and concealment of property and a criminal offense involving fraud connected with a case under U.S.C. Title 11.

45. The making of false oaths in BAC's schedules on September 5, 1974 and on March 8, 1976; the giving of false testimony under the penalty of perjury on December 5, 1974 and on January 27, 1976 by Braten, and on March 9, 1976 by Rhoades; and each of said acts, were criminal offenses involving fraud connected with a case under U.S.C. Title 11.

46. The knowing and fraudulent concealment and transfer of the property of BAC, including the stock of Brookfield, began in August 1974, continues to date, and is a criminal offense involving fraud in connection with a case under U.S.C. Title 11.

47. The transactions between Rhoades and Judge Ballenger were acts involving bribery, which is a criminal offense chargeable under State law and punishable by imprisonment for more than one year.

48. The conveyance by BAC to Todd of BAC's stock in Brookfield, and Todd's receipt of that stock and pledge thereof to relieve the members of the enterprise of their personal liability, were made knowingly, and with intent to defeat the provisions of U.S.C. Title 11, and each of said acts were criminal offenses involving fraud connected with a case under U.S.C. Title 11. The said conveyance and pledge of Brookfield stock has caused the assets of BAC, as of the date of this complaint, to be insufficient to pay the debt owed to Bankers.

49. Each of the foregoing offenses is a "racketeering activity," and any two or more of them constitute a "pattern of racketeering activity," within the meaning of 18 U.S.C. §1961.

50. Defendants have used income derived from the pattern of racketeering activity in the establishment, acquisition and maintenance of controlling interests in the enterprise of affiliated corporations, in violation of 18 U.S.C. §1962(a).

51. Defendants have maintained their control of the enterprise through a pattern of racketeering activity in violation of 18 U.S.C. §1962(b).

52. Defendants have participated in and conducted the affairs of the enterprise through a pattern of racketeering activity in violation of 18 U.S.C. §1962(c).

53. Defendants have conspired to conceal and secrete the assets of BAC from its creditors, and utilize the income derived thereby to acquire interests in and operate the enterprise, to obtain large sums on credit and divert the income earned or moneys borrowed by the enterprise to and for the benefit of its principals, officers, directors, agents and employees, all in violation of 18 U.S.C. §1962(d).

54. As of the date of this complaint, Bankers has not received payment of the debt owed to it by BAC, the fraud of defendants has prevented Bankers from receiving payment of such debt and constitutes a hinderance and impediment to Bankers' rights to receive payment of such debt. In addition, defendants' fraud has caused Bankers to expend over $100,000 in legal fees incurred in the revocation proceeding, over $100,000 in the South Carolina actions, additional substantial expense in the Chapter XI proceedings, and will cause Bankers to incur substantial legal expense, to correct defendants' fraud, in amounts now unknown.

WHEREFORE, plaintiff demands judgment against each defendant, jointly and severally as follows:

(A) In the amount of plaintiff's damages, which the Court should trebel pursuant to 18 U.S.C. §1964(e);

(B) permanently enjoining defendants from concealing, transferring, or in any way dissipating the funds obtained by them by reason of their conduct of and participation in an enterprise through a pattern of racketeering activity;

(C) against defendants Feldesman and Rhoades, pursuant to New York Judiciary Law §487, in treble the amount of plaintiff's damages;

(D) For such exemplary and punitive damages as may be just and proper;

(E) in the amount of plaintiff's attorneys' fees, pursuant to 18 U.S.C. §1964(c);

(F) the costs and disbursements of this action; and

(G) For such other and further relief as may be just and proper.

Dated: New York, New York
August 20, 1982

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